IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JERALD ANTHONY HANSEN a/k/a ANTHONY GERALD HANSEN, Appellant.	No. 36116-7-II UNPUBLISHED OPINION

Armstrong, J.—A jury convicted Jerald Anthony Hansen, a mortgage broker, of sixty-seven counts of second degree theft by deception, one count of first degree theft by deception, and one count of money laundering in connection with his collection of fees for a service he never provided. On appeal, Hansen challenges the sufficiency of the evidence on fifty-seven of those convictions because (1) the victims did not testify on fifty-four of the counts, (2) another victim did not unequivocally testify that she never received the service, and (3) Hansen attempted to actually provide the service in two other cases. Hansen also argues that the trial court denied him a fair trial when it referred to "victims" in a jury instruction instead of "alleged victims. Finally, Hansen argues that his exceptional sentence is invalid because his conduct took

place before *Blakely*[1] was decided. In a statement of additional grounds (SAG),[2] Hansen makes several additional arguments, including that his attorney ineffectively represented him. We affirm.

FACTS

Jerald Hansen originated loans for a mortgage brokerage firm, Country Home Finance. Hansen generally offered his customers an optional Mortgage Payment Acceleration Program (MPAP), which was run by a third party company, the Mortgage Reduction System Equity Corporation (Equity Corp.). The program helps customers make extra payments on their mortgage every year to speed up their loan repayment. Specifically, the program withdraws half of a regular mortgage payment from the customer's bank account every two weeks, putting it into a separate bank account that the mortgage company empties every month. Over the course of the year, the customer makes 13 regular mortgage payments instead of 12, and the extra payment lowers the loan's principal balance. The program can be started at any time during the course of the loan, but it requires the customer to submit an application, a copy of his or her driver's license, and a $95 fee.

Equity Corp. had registered agents to facilitate this application process for their own fee; a customer could not sign up for the MPAP program without going through such an agent.

[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[2] RAP 10.10.

Equity Corp.'s contract with its agents required that when agents receive the MPAP application fee from customers, they must "promptly submit the applications to Equity Corp." 8A Report of Proceedings (RP) at 147. It also required that if Equity Corp. denied the customer's application for any reason, the agent must refund his fee to that customer.

William Reed, another loan originator who shared office space with Hansen, was a registered agent with Equity Corp. and, with Equity Corp.'s permission, allowed Hansen to use his agent number to sell the MPAP program to his customers. According to Equity Corp.'s records, eight MPAP accounts originated with Reed's agent number. Both Reed and Hansen testified that Hansen obtained those accounts. Hansen marketed the MPAP program to nearly every loan customer he had, treating it as an optional service associated with the loan transaction itself. In other words, he proposed taking the fee out of the customer's loan proceeds instead of collecting it when he filed the customer's MPAP application. Hansen listed the $600 MPAP fee on his default "good faith estimate" form as an "optional" closing cost of the loan. 8B RP at 202. For this fee *not* to be charged, Hansen had to affirmatively tell his loan processor, Jennifer Rios, to remove it from the customer's paperwork.

In late 2004, Country Home Finance received complaints from customers about Hansen's collection of MPAP fees. Deborah Anderson, the designated broker at Country Home Finance, asked Hansen to document the fees, but he failed to do so after months of requests. As a result, Anderson fired Hansen in December 2004. According to Hansen, Anderson also instructed him not to contact any of his customers.

In 2006, the State charged Hansen with 68 counts of theft by deception arising out of transactions where customers had paid Hansen the $600 MPAP fee but did not receive the MPAP program. One of the counts was for first degree theft because the alleged victim had taken out three loans and paid Hansen $600 on each one, for a total of $1,800 in MPAP fees.[3] The rest of the charges were for second degree theft.[4] In its information, the State gave notice that it would seek an exceptional sentence because the series of offenses constituted a major economic offense. *See* RCW 9.94A.535(3)(d).

At trial, 14 of the 68 alleged victims testified. Five of those customers testified that they were interested in the MPAP program when Hansen offered it to them. Hansen took $600 from each of their loan amounts for the MPAP program, but they never received the program. Each customer called Hansen to ask after closing about when the program would start, but he either did not return their calls or told them that it was coming. It never did.

In seven other cases, Hansen charged the $600 fee from customers who did not want the MPAP program. Hansen did not enroll them in the program.

One customer, Jerrye Lou Kopp, was not sure whether she and her husband had originally agreed to participate in the MPAP program. When the MPAP fee appeared on their final paperwork after closing, however, she called Hansen to ask what it was for. Hansen

[3] RCW 9A.56.030(1)(a) provides that "[a] person is guilty of theft in the first degree if he or she commits theft of . . . [p]roperty or services which exceed(s) one thousand five hundred dollars in value."

[4] The State also charged Hansen with and a jury convicted him of one count of money laundering, which Hansen does not challenge on appeal.

responded that the fee was for a program and they should have received paperwork on it. They never received any paperwork, and although Kopp's husband tried to call Hansen again about it, he "never really got hold of him." 9 RP at 477. Kopp eventually asked for a refund, but Hansen told her that he was in "hard times" and had no money to give her. 9 RP at 478.

Walter Prall was the victim under count 50. Hansen told Prall about the MPAP program, and Prall decided to participate. Hansen took the MPAP fee out of Prall's loan proceeds. One month after his loan closed, Prall filled out an MPAP application and submitted it to Equity Corp. through Hansen, but Equity Corp. sent it back because there was no photocopy of Prall's driver's license. According to Prall, Hansen never contacted him to refile the application, so he never received the MPAP program.

On the remaining 54 theft counts for which there was no victim testimony, the State relied on (1) the fact that Equity Corp. had no record of the customers receiving the MPAP program and (2) documents from each customer's escrow file showing that Hansen had demanded and received the MPAP fee. After the State rested, Hansen moved to dismiss these 54 counts, arguing that the State was improperly relying on propensity evidence to prove that he had never intended to provide the MPAP to those customers. The trial court denied the motion, ruling that the 14 witnesses who testified established "more than propensity, that's evidence of a common scheme or plan." 10 RP at 643. As such, the jury was entitled to "extrapolate that into the other counts" under ER 404(b). 10 RP at 643.

Hansen was the sole witness for the defense. He testified that he told every customer

who wanted the MPAP program that to participate, they would have to call *him* upon receiving their first payment letter so he could help them fill out the application. Hansen acknowledged that there were "a great many people" who paid for the MPAP program yet never contacted him to follow up, but he asserted that it was never his intent not to set up the program for them. 11A RP at 748. In fact, he had signed up not only the eight customers listed in Equity Corp.'s database, but also "a bunch of people" who were missing from that list. 11A RP at 778. He confirmed that he had submitted an MPAP application on Prall's behalf, and he testified that when Equity Corp. returned the application, he contacted Prall to obtain the missing information. Prall never followed through by filling out a new application.

Hansen also testified that a similar rejection occurred with an application he filed for Eugene Washington, another witness who had testified for the State. He offered Exhibit 45-228, which was an application that appeared to have been filled out by Washington and then returned, like Exhibit 50-226, because of omissions similar to Prall's application. Hansen testified that he went over Equity Corp.'s requirements with Washington but that Washington never provided the information and never refiled.

The jury convicted Hansen of all 69 charges and found that the offenses constituted a major economic offense. The standard sentencing range for the most serious offense, the first degree theft, was 43 to 57 months. The trial court imposed an exceptional sentence of 68 months, restitution of $70,600, and a fine of $10,000.[5] Hansen now appeals.

[5] The trial court also imposed exceptional sentences of 60 months on each of the second degree theft convictions. The standard range was 22 to 29 months.

ANALYSIS

I. Sufficiency of the Evidence

A. Counts Without Victim Testimony

Hansen argues that the State failed to prove the 54 theft counts on which the alleged victims did not testify. We disagree.

We review a defendant's challenge to the sufficiency of the evidence by asking whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). In answering this question, we view the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *Mines*, 163 Wn.2d at 391. We consider circumstantial and direct evidence equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

The evidence on those counts consisted of (1) escrow documents for each loan transaction showing that Hansen demanded and collected MPAP fees as closing costs and (2) the absence of those customers in Equity Corp.'s records as participants in the MPAP program.[6] In addition, Hansen himself testified that although he took the MPAP fee at the closing of the customer's loan, he expected the customer to take the initiative to contact *him* when they wanted to initiate the program. In other words, he had no intention of providing the program until the customer compelled him to.

[6] In his SAG, Hansen argues that the failure of Equity Corp.'s database to reflect the letters exchanged regarding Washington's and Prall's applications to the MPAP program "demonstrated conclusively [sic] the lack of accuracy on the part of Equity Corp.['s] data base." SAG at 7. This argument is a request for us to make a credibility determination regarding the evidence; this we cannot do. *Mines*, 163 Wn.2d at 391.

Hansen asserts that the State relied on "the improper conclusion that Mr. Hansen had a propensity to commit a theft based on the testimony of the testifying victims." Br. of Appellant at 19. Generally, evidence of other crimes, wrongs, or acts is not admissible to show that a person has a propensity to commit such crimes. ER 404(b). But the trial court ruled that the series of the 68 transactions constituted a "common scheme or plan." 10 RP at 643; *see generally State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). Hansen does not challenge this ruling. And the victims' testimony on the 14 counts when coupled with evidence that each victim was charged the fee and none obtained the program was more than sufficient to prove that Hansen had an overarching plan to commit theft by deception.

Hansen also argues that the jury must have improperly "assume[d]" that (1) Equity Corp. was the only provider of mortgage payment acceleration programs and (2) Hansen's $600 fee was intended to be in exchange for enrolling the customers into the MPAP program as opposed to *explaining* the program. Br. of Appellant at 19. Neither of these assertions is persuasive; nothing in the record suggests that Hansen had access to any other mortgage acceleration program or charged the $600 fee for a mere explanation. We hold that the evidence was sufficient to sustain the 54 counts without victim testimony.

B. Count Eight - Yoshitake

Hansen argues that the evidence was insufficient to sustain his conviction on count eight because "the alleged victim was unable to confirm that she did not receive a mortgage payment acceleration program." Br. of Appellant at 21 (emphasis omitted). The record does not support this argument. While the record is clear that the victim on that count did not speak English as her

first language, she did testify that "biweekly payment we haven't received." 9 RP at 417. We affirm count eight.

C. Counts 45 and 50—Prall and Washington

Hansen argues that insufficient evidence supports his convictions on counts 45 and 50 because the evidence showed that he actually submitted MPAP applications on behalf of those customers, Walter Prall and Eugene Washington.

The State charged Hansen under RCW 9A.56.020(1)(b), which defines "theft" as obtaining the property of another by "color or aid of deception . . . with intent to deprive him or her of such property." The definition of "deception" that the State primarily relied on was "[p]romis[ing] performance which the actor does not intend to perform or knows will not be performed." RCW 9A.56.010(5)(e). The State reasoned below that when Hansen collected the MPAP fee from loan customers, he made an "implied promise" to provide them with the MPAP program even though he had no intention of doing so. And in the two cases where Hansen submitted applications, the State relied on the fact that the applications were invalid and Hansen never refiled them when they were sent back. This evidence is sufficient to support a reasonable inference that Hansen never intended to provide the MPAP program to Prall and Washington.

II. Judicial Comment on the Evidence

Hansen argues that the trial court denied him a fair trial by referring to the victims of counts 19 through 68 as "victims" instead of "alleged victims" in the jury instruction that set out all of the charges in a table. On the first page of the table, the third column was labeled "Name" for the name of the alleged victim. Clerk's Papers (CP) at 137. On the second through fourth

pages of the table, however, that same column was labeled "Victim" instead. CP at 138-40. Hansen argues that the characterization of those customers as "victims" constituted an impermissible comment on the evidence.

Article 4, section 16 of the Washington Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." An impermissible comment conveys to the jury a judge's personal attitudes about the merits of a case or the credibility of certain testimony. *Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004) (citing *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988)). But the comment violates the constitution only if those attitudes are "'reasonably inferable from the nature or manner of the court's statements.'" *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999) (quoting *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)).

Here, the apparently inadvertent labeling of a summary chart does not suggest the trial court's attitude toward the merits of the case. The instruction itself introduced the chart as including "alleged victims," so the jury knew that all the columns referred to "alleged victims." We find that the mislabeling was not an impermissible comment on the evidence.

III. Exceptional Sentence

Hansen argues that we must vacate his exceptional sentence because it violates his right to equal protection of the laws. Specifically, he argues that under *State v. Pillatos*, 159 Wn.2d 459, 474, 150 P.3d 1130 (2007), the State improperly treats criminal defendants who committed their crimes before *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004),

differently depending on when their cases are adjudicated. The *Pillatos* court held that the "*Blakely* fix" statute, Laws of 2005, chapter 68, which provided procedures for trial courts to empanel a jury to decide aggravating factors, could be applied to any case where no trial had begun or plea had been accepted, regardless of when the crime was committed. *Pillatos*, 159 Wn.2d at 470. But it considered the question only under "general common law principles of retroactivity" and constitutional ex post facto protections. *Pillatos*, 159 Wn.2d at 470, 474-75. Hansen argues that the reasoning of the *Pillatos* court creates a sentencing scheme that violates both the state and federal equal protection clauses because it subjects people who were not able to plead guilty or go to trial before April 2005 to exceptional sentences, while those who were able to plead or go to trial are exempt from such a sentence.[7] According to Hansen, this disparate treatment violates the equal protection clause because "[t]here is no rational basis for rewarding the former category and punishing the latter." Br. of Appellant at 26; *see* U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 12.

As a preliminary matter, it was not the *Pillatos* decision that created the disparate treatment of which Hansen complains; it was the "*Blakely* fix" statute itself. *See* Laws of 2005, ch. 68, § 4(1) (allowing "fix" "[a]t any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced"). Consequently, we analyze the statute for an equal protection violation, not the *Pillatos* decision.

Hanson admits that because he is not a member of a suspect class, rational basis review

[7] *Blakely* requires that a jury find the facts necessary to impose a sentence greater than the high end of the standard range. *Blakely*, 542 U.S. at 313. And before the "*Blakely* fix" statute, trial courts lacked authority to submit those factual issues to juries. *State v. Hughes*, 154 Wn.2d 118, 149, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

applies. *See Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008). Under this test, a law does not violate equal protection if there is a rational relationship

between the classification and a legitimate state interest. *State v. Osman*, 157 Wn.2d 474, 486, 139 P.3d 334 (2006). The defendant has the burden of proving that the classification is purely arbitrary. *In re Det. of Thorell*, 149 Wn.2d 724, 749, 72 P.3d 708 (2003).

In this case, the legislature did not intend to exempt those individuals who pleaded guilty or went to trial before April 15, 2005. Rather, it intended for exceptional sentences to be available for *all* offenders, but after *Blakely* it was powerless to accomplish that result in cases where judgment had already been entered because of double jeopardy concerns. *See State v. Murawski*, 142 Wn. App. 278, 289 n.28, 173 P.3d 994 (2007). There was, therefore, a rational basis for the legislature's distinction between the two groups of defendants: one group fell within the scope of its authority, and the other did not. And because both the defendants at issue had notice of the possibility of an exceptional sentence when they committed their crimes, the legislature should not be forced to use the lowest common denominator of sentencing for both groups. The fact that some defendants escaped the possibility of an exceptional sentence was more like a windfall to those defendants than an equal protection violation against the remaining defendants. Hansen's equal protection claim therefore fails.[8]

[8] Hansen also suggests that his rights against equal protection were violated because the prosecutor deliberately delayed bringing his case to trial or offering him a plea bargain until the law was passed. He states that "due to arbitrary or possibly premeditated and calculated delaying tactics by [the] State, [he was] subjected, irrationally, to harsher treatment because [he could then] be subjected to an exceptional sentence." Motion for Reconsideration at 4. The record does not support this assertion, but even if Hansen could substantiate such deliberate delay tactics by the prosecutor, the issue would be properly raised as a sixth amendment violation of the right to a speedy trial, rather than as an equal protection violation.

IV. Statement of Additional Grounds

A. Ineffective Assistance of Counsel

In his pro se SAG, Hansen argues that his attorney ineffectively represented him by (1) refusing to investigate, answer his questions, and follow his instructions regarding the defense, (2) lying to Hansen and the court about his preparations for trial, (3) withholding evidence from trial, (4) waiving Hansen's right to be present at trial without his consent, and (5) not preparing for sentencing.

A criminal defendant claiming ineffective assistance of counsel must prove that (1) his attorney's performance falls below an objective standard of reasonableness considering all the circumstances and (2) the attorney's deficient performance prejudiced him. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A legitimate trial strategy or tactic does not constitute deficient performance, and we strongly presume that counsel was effective and reasonably professional. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). A defendant establishes prejudice by showing a reasonable probability that the result would have been different but for the counsel's errors. *Reichenbach*, 153 Wn.2d at 130.

1. Previous Attorney

Hansen argues initially that his first attorney, George Brintnall, was deficient because he refused to return his phone calls, make appointments, or investigate his case. Although the trial court ultimately appointed Hansen a different lawyer, Jeffrey Barrar, because of the breakdown of the first attorney-client relationship, Hansen contends that the State was given an unfair advantage in the amount of time it had to prepare for trial. Nothing in the record supports the assertion that

the State gained any advantage from the extra time, or that the defense was prejudiced. This claim fails.

2. Refusal to Defend or Prepare for Sentencing

Hansen argues that Barrar "refused to prepare any defen[s]e, . . . nor would Mr. Barrar follow any of the suggestion[]s, recommendation[]s, or specific instruction[]s of his client." SAG at 2. He lists several examples of tasks that Barrar "refused" to perform, but the record does not support that any such refusals occurred.[9] In fact, Barrar told the trial court that he was performing many of those tasks. The record similarly does not support Hansen's claim that counsel withheld evidence. Hansen asserts that Barrar did not follow his instructions as to how to conduct the defense. Again, nothing in our record supports the claim.

3. Waiving Right to Be Present

During its deliberations, the jury asked the trial court for the date that Hansen was charged. The trial court discussed the matter with both counsel, who agreed that the trial court should answer the jury's question. Hansen was not present for this discussion although the parties attempted to reach him via his cell phone. Barrar told the court that he was "confident" in waiving Hansen's presence on the question, so the court answered the jury's question. 11B RP at 839. Hansen argues that Barrar's waiver of Hansen's right to be present without his permission violated his right to effective assistance of counsel.

Under the Sixth and Fourteenth Amendments, a criminal defendant has the right to attend all critical stages of his trial. *State v. Pruitt*, 145 Wn. App. 784, 798, 187 P.3d 326 (2008). A

[9] A personal restraint petition is the appropriate procedure for raising a claim of ineffective assistance of counsel based on matters outside of the record on appeal. *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206-07, 53 P.3d 17 (2002).

critical stage is one where the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (per curiam) (quotations omitted)). The core of the constitutional right to be present arises when evidence is being presented. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). In-chambers or bench conferences between the court and counsel on legal matters are not critical stages, at least where those matters do not require a resolution of disputed facts. *Lord*, 123 Wn.2d at 306.

The conference regarding the jury question in this case was analogous to the in-chambers or bench conferences found not to be critical in *Lord*. The date of the State's charges against Hansen was not a disputed fact, nor was it prejudicial to Hansen's defense. In this context, Hansen's presence would have been "useless, or the benefit but a shadow." *Pruitt*, 145 Wn. App. at 798 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (quotations omitted)). Counsel was not deficient in waiving Hansen's presence at the hearing.

B. Sufficiency of the Evidence

Hansen makes several arguments regarding the sufficiency of the evidence against him.

1. Count 1 - Sheryl Perrie

Hansen argues that the evidence against him on count one was insufficient because he gave that customer, Sheryl Perrie, a refund of the MPAP fees she had paid him. He points to Exhibit 227, which was a copy of a $2,000 cashier's check from Hansen to Perrie. But the check

did not include any written indication of what it was for, and Hansen was renting housing from Perrie at the time. The jury was entitled to conclude that the check was not a refund of MPAP fees.

2. Counts 3 and 54—Witnesses not present at original loan negotiations

Hansen argues that the evidence on counts 3 and 54 was insufficient because the witnesses who testified were not present at the original negotiations of their loan terms. In each case, Hansen originally discussed the loans with the witnesses' husbands, who did not testify. Hansen contends that any testimony by these witnesses constituted inadmissible hearsay and that these counts should be dismissed.

This argument fails because the critical testimony from those two witnesses was not hearsay; both women testified that Hansen told them they would receive an MPAP program, but they never did. They had personal knowledge of this and did not discuss any out-of-court statements by their husbands in the original loan negotiations.

3. Counts 3, 8, 62, 63, 64, 65, 66, 67, 68—Loans closing when Hansen was fired

Hansen argues that sufficient evidence does not support counts 3, 8, 62, 63, 64, 65, 66, 67, and 68 because Country Home Finance fired him shortly after the loans closed and ordered him not to contact his customers. Thus, he argues, he failed to provide the MPAP program to those customers because he was forbidden to do so, not because he never intended to. This argument is unpersuasive. Not only was there other evidence that Hansen never intended to provide the MPAP program, but his ability to do so did not have anything to do with his employment with Country Home Finance; it arose from his partnership with Reed. The evidence

was sufficient on these counts.

C. Unethical Prosecution

Hansen argues that the State engaged in "[u]nethical" and "[i]llegal [i]nvestigative [p]ractices" in this case. SAG at 8. None of the facts he asserts are in the record, so we do not consider this argument.

D. Cumulative Error

Hansen argues finally that he is entitled to a new trial because cumulative error denied him his constitutional right to a fair trial. Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors, though individually not reversible, cumulatively produced a trial that was fundamentally unfair. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). In this case, there were no errors, so Hansen's argument fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Houghton, P.J.

Bridgewater, J.